

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 30, 2007

STATE OF TENNESSEE v. GENENOE WYKLE

Appeal from the Criminal Court for Knox County
No. 84646 Mary Beth Leibowitz, Judge

No. E2007-00079-CCA-R3-CD - Filed February 7, 2008

The Appellant, Genenoe Wykle, appeals the Knox County Criminal Court's denial of his request for judicial diversion. Wykle pled guilty to two counts of sale of a Schedule II controlled substance, Class C felonies, and one count of evading arrest, a Class A misdemeanor. Under the terms of the plea agreement, Wykle received consecutive three-year sentences for each felony conviction, which were to be served concurrently with the eleven month and twenty-nine day sentence imposed for the misdemeanor, resulting in an effective sentence of six years. The agreement also specified that Wykle be allowed to seek judicial diversion. At a scheduled court appearance, the trial court denied Wykle's request for diversion, instead ordering him to serve his sentence under the supervision of the Community Alternative to Prison Program ("CAPP"). On appeal, Wykle argues that the trial court erred in failing to consider the required factors in determining whether to grant or deny diversion. After review, we agree that the requisite factors were not considered. Indeed, our review of the record reflects that no sentencing hearing was ever conducted by the trial court prior to its summary pronouncement that the Appellant's request for diversion was being denied. As such, we are unable to conduct a *de novo* review of the trial court's denial of diversion, and, accordingly, we reverse and remand the case to the Knox County Criminal Court for a sentencing hearing and for written findings of fact and imposition of sentences in accordance with statutory law.

Tenn. R. App. P. 3; Judgment of the Criminal Court Reversed and Remanded

DAVID G. HAYES, J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ., joined.

Mark E. Stephens, District Public Defender, and Jessica Greene, Assistant Public Defender, Knoxville, Tennessee, for the Appellant, Genenoe Wykle.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Steve Sword, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Procedural History

The underlying facts of the case, as established at the guilty plea hearing, are as follows:

... [O]n November 16, 2005, Knoxville Police Department officers observed the [Appellant] . . . standing in the alleyway between Lyndon and Magnolia. As the officers continued to observe[] the [Appellant], they witnessed him selling what appearing to be crack cocaine to two other male individuals.

At this point the officers approached and instructed the [Appellant] to stop, and he lead them on a short foot pursuit. After being apprehended on East Fifth Avenue, the Officers conducted a search of [the Appellant's] person and discovered that he had a baggie of what appeared to be crack cocaine and did, in fact, test positive for crack cocaine later on, as well as six hundred eighty-seven dollars (\$687) in cash. . . .

. . . .

Then on the 26th day of January of this year officers again observed the [Appellant] on Spruce Street, near 304 Spruce Street. Actually, it's behind the residence there. As officers were conducting a sweep for a narcotics investigation, based on complaints by the local residents, they observed the [Appellant]. And once the [Appellant] saw the officers he began to run. Again, a short foot pursuit ensued, and officers were able to apprehend him. Upon stopping him a search was conducted of his person. They discovered six hundred and fifty-five dollars (\$655) in cash, a cell phone, and near where they had stopped him they also discovered a large amount of crack cocaine that was packaged in several small baggies, one larger and several smaller baggies wrapped inside a brown paper bag. . . .

The prosecution was commenced by the filing of an information, which charged the Appellant with two counts of sale of a Schedule II controlled substance, specifically less than .5 grams of cocaine, Class C felonies, and one count of evading arrest, a Class A misdemeanor. As provided by the plea agreement, following entry of the Appellant's guilty pleas, he received consecutive three-year sentences, as a Range I offender, for each Class C felony and an eleven month and twenty-nine day sentence for the misdemeanor conviction, which was to be served concurrently to the felony sentences. The agreement further provided that the Appellant was to receive non-incarcerative sentences, although the precise manner of service of the sentences was not specified.

Furthermore, the agreement provided that the Appellant would be applying for judicial diversion.¹ The trial court accepted the Appellant's guilty pleas and directed that a pre-sentence report be prepared, reserving judgment at that time on the issues of the manner of service of the sentences and the request for judicial diversion. The case was continued until July 14, 2006.

On July 14, the court reviewed the report from the State Probation Office, which recommended that the Appellant be referred to the "Enhanced Probation Program Supervisor." The case was then continued until August 24, 2006. The matter was again continued when the parties returned to court on August 24, as the Appellant had failed to make a follow-up appointment with the probation officer. On September 22, 2006, the Appellant failed to report to court. However, the trial court, nonetheless, referred him to the Knox County Community Alternative Prison Program ("CAPP") for an assessment of his placement in the program. The case was again continued. On October 13, the case was again reset for November 16, 2006, as the Appellant had failed to meet with CAPP personnel as directed. On November 16, the Appellant failed to appear in court, and a *capias* was issued. On November 27, 2006, the Appellant appeared in court, at which time the trial court set aside the forfeiture and continued the case until December 13, 2006. On December 13, because the Appellant had failed to meet with CAPP personnel, as directed, the Appellant was instructed to do so immediately. The case was then reset for December 14, 2006, at which time the court was informed that the Appellant had met with a CAPP case officer and that they would accept him into the program. Upon receiving this information, the trial court summarily denied the Appellant's application for judicial diversion and ordered that his effective six-year sentence be served in the Knox County Community Alternative to Prison Program.

Analysis

On appeal, the Appellant challenges the denial of diversion by the Knox County Criminal Court. Specifically, he asserts that the trial court failed to make requisite findings that would indicate the court properly considered and followed sentencing guidelines and requirements. According to the Appellant, the court denied his application based solely upon the length of time it took him to be sentenced and his failure to pay more toward his court costs.

In deciding whether to grant judicial diversion, the trial court must consider the following factors: (1) the accused's amenability to correction; (2) the circumstances of the offense; (3) the accused's criminal record; (4) the accused's social history; (5) the status of the accused's physical and mental health; (6) the deterrence value to the accused as well as others; and (7) whether judicial diversion will serve the ends of justice. *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn.

¹The written plea agreement document, included in the record, contains no reference to the fact that non-incarcerative sentences would be requested. At the guilty plea hearing, the assistant district attorney announced to the trial court that the Appellant would be "applying for judicial diversion." Defense counsel further explained, "It's agreed probation, your Honor, but we haven't agreed as to which level of probation." Thus, it is altogether unclear whether the plea agreement provided, at a minimum, that the Appellant would receive probation or a community based alternative sentence, which are clearly two different sentencing options. We emphasize that the terms of the plea agreement should be stated with clarity and set forth in the guilty plea agreement to prevent ambiguity in the recommended sentence.

Crim. App. 1998); *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). Additional factors which may be considered included a defendant's attitude, behavior since arrest, home environment, current drug usage, emotional stability, past employment, general reputation, family responsibilities, and the attitude of law enforcement. *State v. Lewis*, 978 S.W.2d 558, 566 (Tenn. Crim. App. 1997).

The record must indicate that the court has weighed all of the factors in reaching its determination. *Electroplating, Inc.*, 990 S.W.2d at 229. If the trial court denied the request for judicial diversion, it should state in the record "the specific reasons for its determinations." *Parker*, 932 S.W.2d at 958-59. If the trial court "based its determinations on only some of the factors, it must explain why these factors outweigh the others." *Electroplating, Inc.*, 990 S.W.2d at 229. The decision of whether to grant a request for judicial diversion lies within the sound discretion of the trial court, and this court will not disturb that decision on appeal absent an abuse of discretion. *State v. Robinson*, 139 S.W.3d 661, 665 (Tenn. Crim. App. 2004); *Electroplating, Inc.*, 990 S.W.2d at 229.

The record reflects that on December 14, no testimony was introduced, no evidence was presented, other than the pre-sentence reports already in the record, and, in fact, no hearing was held with regard to the Appellant's request for diversion of his sentences. The record indicates that the Appellant was called before the court, at which time the trial court imposed the three sentences, as provided by the plea agreement, resulting in an effective six-year sentence. Following the imposition of sentences, the court further pronounced, "And I'm going to place him today on CAPP." At this point, defense counsel queried, "Will your Honor be granting or denying the application for Judicial Diversion as well today?"

In reply, the trial court responded:

. . . [H]e's lucky he's not in jail. [The Appellant] applied for Judicial Diversion on June 1st, and Judicial Diversion is for those who have made a mistake in there lives, we hope, and are ready to change things.

He had applied for Judicial Diversion for the offense of selling crack cocaine, and he got a really - - he got a really good deal because it was a B felony. And he had a lot of problems doing the things he had to do. There were forfeitures. There was a lot of difficulty.

[The Appellant] had paid some of his costs today, but he just did that today after six months. And I don't think [the Appellant] has taken the steps necessary. I'm going to go ahead and convict him today and enter judgment. But I am going to place him on CAPP. And hopefully, we're going to get his life straightened out from that perspective.

. . . He's fortunate that I didn't put him in prison. We did him a favor; he didn't do it for himself is what I'm trying to say.

Clearly, the record fails to establish that the trial court considered the requisite factors in denying the Appellant diversion and failed to place on the record its reasons for denying diversion. The lack of evidence and the absence of findings serve to preclude our statutorily mandated *de novo* review of the sentences imposed, as there is nothing before us to review. While we would agree that the Appellant's failure to report as instructed, his failure to meet scheduled court appearances, and his apparent nonchalant attitude in accepting his obligations, certainly adversely reflects upon his "amenability toward correction," this is one but one of many factors to be considered when diversion is requested. Accordingly, remand is necessary in this case.

CONCLUSION

Based upon the foregoing, the trial court's order denying the Appellant's request for judicial diversion is reversed, and this matter is remanded for further proceedings consistent with this opinion.

DAVID G. HAYES, JUDGE